

*File*

BEFORE THE SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

1 IN THE MATTER OF A SHORELINE )  
2 SUBSTANTIAL DEVELOPMENT PERMIT )  
3 ISSUED AND SHORELINE VARIANCE )  
4 PERMIT DENIED BY THE TOWN OF )  
5 YARROW POINT TO JAMES AND KAREN )  
6 SWYGARD, )

NOS. 87-22 and 87-23

7 MR. AND MRS. DAVID YULE, et al., )  
8 and JAMES AND KAREN SWYGARD, )

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER

9 Appellants, )

10 vs. )

11 TOWN OF YARROW POINT and STATE )  
12 OF WASHINGTON, DEPARTMENT OF )  
13 ECOLOGY, )

14 Respondents. )

15 These consolidated requests for review of a Shoreline Substantial  
16 Development Permit issued by the Town of Yarrow Point to James and  
17 Karen Swygard and denials of the Swygard's application for Shoreline  
18 variances, came on for hearing before the Shorelines Hearings Board,  
with Lawrence J. Faulk, presiding, on January 13, & 14, 1988, in Hunts  
Point, Washington and March 14, 1988, in Lacey, Washington. Board  
members Annette McGee, Richard Gidley, William Cameron and Robert Rose  
were in attendance. (Board member Gidley later discovered a potential  
conflict of interest arising out of his employment with the City of  
Bellevue and, therefore, did not participate in the decision of this  
matter).

1 Appellants James and Karen Swygard appeared, represented by their  
2 attorney, Jaems E. Graham. Appellants Yule, et al, were represented  
3 by their attorney, Richard J. Thorpe. The Town of Yarrow Point was  
4 represented by Larry C. Martin.

5 Witnesses were sworn and testified, exhibits were introduced and  
6 examined. Each Board member who participated in this decision but did  
7 not attend the hearings has reviewed the hearing transcript of the  
8 first two days of the hearing, and the tape recording of the final  
9 day, together with all exhibits in the custody of the Board. Cross  
10 motions to re-open the hearing were made and are hereby denied. Based  
11 upon the testimony and exhibits presented, the Shorelines Hearings  
12 Board makes these

#### 14 FINDINGS OF FACT

##### 15 I

16 Appellants James and Karen Swygard (Swygards) own a home located  
17 on a hillside in the Town of Yarrow Point overlooking Yarrow Bay on  
18 Lake Washington. The Swygard's property extends down a hillside and  
19 includes a relatively level portion continuing to the shoreline of  
20 Lake Washington. The adjacent property to the south is owned by the  
21 appellants Yule, Anderson and Granberg. Appellant Granberg's  
22 residence is located toward the top of the hillside. He also owns a  
23 vacant building lot on a relatively level portion of the property at  
24

1 the foot of the hill, which in turn lies upland of the waterfront  
2 community beach owned in common by those residing on the parcel  
3 immediately to the south of the Swygards.

## 4 II

5 In the summer of 1985, the Swygards began construction of a  
6 swimming pool, tennis court, tennis court fencing, including light  
7 standards, and boundary fencing on the middle and lower portions of  
8 their property. Their development plans also include a proposed  
9 bathhouse in conjunction with the swimming pool. They commenced  
10 development with excavation and construction of the swimming pool,  
11 followed by grading, filling and construction of the the tennis court,  
12 tennis court fencing, light standards and boundary fencing. This  
13 construction was performed without obtaining a Shoreline permit from  
14 the Town of Yarrow Point.

## 15 III

16 A portion of the swimming pool, proposed bathhouse and boundary  
17 fencing is located within 200 feet of the ordinary high water mark of  
18 Lake Washington. The tennis court, tennis court fencing and light  
19 standards are located within 200 feet of the ordinary high water mark.

## 20 IV

21 The chain link tennis court fencing is approximately 10 feet in  
22 height on the north, south and east sides and approximately 6 feet in  
23 height along a portion of the north fence line. The fencing includes  
24

1 a green, opaque windscreen material. Light standards are distributed  
2 around the tennis court fence which extend several feet above the top  
3 of the fence.

4 V

5 The lower portion of the Swygard property, as well as the  
6 neighboring properties both to the north and the south, was at one  
7 time covered by the waters of Lake Washington. Upon opening of the  
8 Lake Washington ship canal the level of the Lake was lowered, exposing  
9 the lower portions of these properties. Throughout the years, filling  
10 has occurred at various locations on portions of the properties and  
11 the Lake has reestablished an ordinary high water mark on what is  
12 today the shoreline.

13 VI

14 The eastern portion of the tennis court, tennis court fencing and  
15 light standards is located less than 50 feet from the ordinary high  
16 water mark of Lake Washington. The wooden board fence constructed  
17 along the south boundary of the Swygard property is approximately 6  
18 feet when measured from the top to the bottom of the fence. The fence  
19 was constructed so that some distance remained between the bottom of  
20 the fence and the level of the ground at the time of construction,  
21 which varies, but which is generally about one foot. This space was  
22 filled in by the Swygards by depositing earth, straw, wire, rocks,  
23 concrete and other debris which form a fill at the base of the fence.

1 These materials hold back earth on the Swygard side of the fence and  
2 function as a sort of retaining wall. When measured from the grade  
3 which existed immediately prior to construction of the fence, it is  
4 clear that the south boundary fence exceeds 6 feet in height  
5 throughout a major portion of that part of the fence located within  
6 200 feet of the ordinary high water mark.

7 VII

8 A distinct demarcation on the soil and vegetation exists along the  
9 shoreline of the community beach property up to its intersection with  
10 the south boundary fence. The fence extends waterward of this  
11 intersection.

12 VIII

13 The shoreline area along the Swygard's property to the north of  
14 the south boundary fence is of substantially different character than  
15 the shoreline to the south. It has been altered through the deposit  
16 of a sandy soil material similar to that deposited at the south  
17 terminus of the tennis court pad, "log rounds", vegetation and other  
18 materials, all of which extend waterward from what appears to be a  
19 natural continuation of the shoreline on the south side of the  
20 boundary fence. Testimony and exhibits presented demonstrate that  
21 some of this material was deposited at the time of grading and filling  
22 for the tennis court.

IX

Wetland types of vegetation are growing along the community beach side of the fence landward of the terminus of the south boundary fence. This vegetation extends landward to the line of vegetation along the community beach property and to the approximate point of the survey stake placed by Mr. Hitchings, which testimony indicated represented the elevation of 22 feet. Testimony indicated that the Army Corp of Engineers regards 21.85 feet as the normal high water level of the Lake and that the Town of Yarrow Point uses 22 feet as a demarcation for the high water level.

X

On the Swygard's side of the south boundary fence wetland vegetation extends upland at various points and can be seen growing through the sandy soil material in approximately the location of the line of vegetation which appears immediately on the south side of the fence on the community beach property.

XI

The view of Lake Washington and the shoreline to the north and east from the community beach property, and the upland property owned by the appellants Granberg and Yule, is partially obscured by the south boundary fence, the tennis court fence and the light standards.

XII

The Town of Yarrow Point has adopted a Shoreline Master Program which was approved by the Department of Ecology on March 15, 1975. WAC 173-19-2525. The Master Program makes reference to the Town's Zoning Ordinance No. 165, which has subsequently been replaced with Yarrow Point Ordinance No. 225.

XIII

The Swygards first submitted an application for a substantial development permit on June 19, 1986. The Yarrow Point Town Council conducted a public hearing for the purpose of considering the application on September 9, 1986. The Town Council treated the application as also requesting a shoreline variance for those portions of the tennis court fence and light poles which exceed the height of 6 feet and which are located within 50 feet of the ordinary high water mark and for that portion of the south boundary fence which exceeds 6 feet in height and which is located within 200 feet of the ordinary high water mark. The 50 foot setback and 6 foot height limitations were derived from the Town's Zoning Ordinance.

XIV

After conducting the hearing and considering motions for reconsideration asserted by the Swygards and appellants Yule, et al., the Town Council conditionally granted the substantial development permit, denied the variances and issued its written findings,

1 conclusions and order dated March 19, 1987. After the filing of  
2 requests for review by the Swygards and appellants Yule, et al.,  
3 certification of the request for review by the Department of Ecology  
4 and entry of an order consolidating the appeals, a pre-hearing  
5 conference was conducted on July 10, 1987, culminating in the issuance  
6 of a pre-hearing order dated July 13, 1987. The pre-hearing order  
7 states five issues to be decided in this appeal.

8 XV

9 Subsequent to issuance of the Pre-Hearing Order the Town conducted  
10 a second hearing for the purpose of considering the variances for the  
11 Swygart development. The hearing was proceeded by written notice to  
12 the Swygards, other interested parties and through publication. The  
13 Swygards appeared at the hearing, represented by their attorney, James  
14 Graham, and presented testimony and argument to the town Council.  
15 After the close of the hearing, the Town issued its supplemental  
16 findings, conclusions and order, again denying the variances.

17 XVI

18 Any conclusion of law which has been denominated a finding of fact  
19 above is hereby deemed to be a conclusion of law. From the foregoing  
20 Findings of Fact, the Board makes the following  
21  
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25

26 SHB 87-22 & 87-23  
27 FINAL FINDINGS OF FACT  
CONCLUSION OF LAW & ORDER



CONCLUSIONS OF LAW

I

The Board has jurisdiction over the persons and subject matter of these consolidated appeals.

II

The five issues to be decided by the Board are stated in the Pre-Hearing Order. In order to address these issues in a logical sequence, we will take them up in the order stated below. The burden of proof in the case of the substantial development permit is upon the appellants Yule, et al., to demonstrate that the permit as issued is not consistent with the Shoreline Management Act, RCW Chapter 90.58, and the Yarrow Point Master Program. RCW 90.58.140(7); RCW 90.58.140(2)(b). In the case of challenges to denial of the variances, the burden of proof rests with the Swygards to show that each of the criteria established for granting of a shoreline variance has been satisfied. RCW 90.58.140(7); WAC 173-14-150.

III

ARE THE SWYGARDS' IMPROVEMENTS EXEMPT FROM THE PERMIT PROCESS UNDER RCW 90.58.030(3)(E)(6) AND WAC 173-14-040()(G)?

The Swygards' improvements are not exempt from the requirement of obtaining shoreline permits. RCW 90.58.030(3)(E)(6) and WAC 174-14-040(1)(G) exempt construction of a single family residence. The development under consideration here does not involve construction

1 of a single family residence, nor was it undertaken in conjunction  
2 with construction of such a structure.

3 WAC 173-14-040(G) identifies the exemption as follows:

4 Construction on wetlands by an owner, lessee or  
5 contract purchaser of a single-family residence for  
6 his own use or for the use of his family, which  
7 residence does not exceed a height of thirty-five  
8 feet above average grade level and which meets all  
9 requirements of the state agency or local government  
10 having jurisdiction thereof, other than requirements  
11 imposed pursuant to this chapter. "Single-family  
12 residence" means a detached dwelling designed for  
13 and occupied by one family including those  
14 structures and developments within a contiguous  
15 ownership which are a normal appurtenance. An  
16 "appurtenance" is necessarily connected to the use  
17 and enjoyment of a single-family residence and is  
18 located landward of the perimeter of a marsh, bog,  
19 or swamp. On a state-wide basis, normal  
20 appurtenances include a garage; deck; driveway;  
21 utilities; fences; and grading which does not exceed  
22 two hundred fifty cubic yards (except to construct a  
23 conventional drainfield). Local circumstances may  
24 dictate additional interpretations of normal  
25 appurtenances which shall be set forth and regulated  
26 within the applicable master program. Construction  
27 authorized under this exemption shall be located  
landward of the ordinary high water mark.

18 Even if construction on a residential property undertaken separate and  
19 apart from construction of the single-family dwelling could be  
20 considered to be "appurtenances" falling within the definition of  
21 "single-family residence", the swimming pool, tennis court and tennis  
22 court fencing are not the type of improvements "necessarily connected  
23  
24  
25

1 to the use and enjoyment of a single-family residence" which are  
2 contemplated by the statute and regulation. Neither could the south  
3 boundary fence be considered as included within this definition since,  
4 as concluded below, this fence does not meet "all requirements of the  
5 State agency or local government having jurisdiction thereof", nor,  
6 as also concluded below, is the boundary fence entirely located  
7 "landward of the ordinary high water mark".  
8

9 IV

10 WHETHER THE SWYGARDS ARE ENTITLED TO A REMAND OF THE  
11 VARIANCE ISSUE TO THE TOWN OF YARROW POINT BECAUSE OF  
INSUFFICIENT NOTICE OF THE TOWN PROCESS?

12 The Swygards are not entitled to remand. The allegation of the  
13 Swygards upon which the requested remand is based was that the Town  
14 provided insufficient notice that it would consider the Swygards'  
15 application for a substantial development permit to also be a request  
16 for shoreline variances. However, any deficiency in notice during the  
17 proceedings leading up to the Town's March 1987, decision was cured by  
18 the re-hearing and proceedings which culminated in issuance of the  
19 Town's supplemental findings, conclusions and order dated November  
20 10, 1987. Council for appellants Swygards stipulated that adequate  
21 notice of the pre-hearing was provided. (Hearing transcript, pages  
22 11-15).  
23  
24  
25

Moreover, as we have previously held, the de novo hearing before the Shorelines Hearings Board cures procedural effects which occurred in review of the application by the local jurisdiction. Attorney General v. Grays Harbor County, SLENES and Department of Ecology, SHB No. 231.

V

WHETHER THE LOCAL MASTER PROGRAM IS IN VIOLATION OF RCW 90.58.140(3) AND WHETHER THE SHORELINES HEARINGS BOARD HAS JURISDICTION TO DECIDE THIS ISSUE?

Turning first to the question of jurisdiction, the Board's jurisdiction is derived only from RCW 90.58.180(1) (review of the granting or denial of a permit) and RCW 90.58.180(4) (appeal by local government of master programs adopted or approved by the department). Absent a request for review falling within the scope of one of these statutes, the Board has no jurisdiction to hear a request for review. Citizens for Responsible Courthouse Sitting and Planning, et al., v. Thurston County Commissioners, SHB No. 212. RCW 90.58.180(4) authorizes an appeal from an action of the Department of ecology approving or denying a local master program, or amendment thereto, only on the part of the affected local government. It does not authorize the Board to hear an appeal by an individual of the validity of a local master program.

1 The Washington State Department of Ecology is vested by the  
2 Shoreline Management Act with authority to approve or disapprove local  
3 master programs. RCW 90.58.090. In this case, the Department of  
4 Ecology has determined that the Yarrow Point Master Program is in  
5 compliance with the Shoreline Management Act and has approved the  
6 same. WAC 173-19-2525. This Board does not have jurisdiction to  
7 review that determination.

8  
9 VI

10  
11 WHETHER THE PROPOSED DEVELOPMENT IS CONSISTENT WITH THE  
12 SHORELINE MANAGEMENT ACT (SMA), AT CHAPTER 90.58.020 RCW;  
13 I.E., WHETHER IT IS DESIGNED TO MINIMIZE INsofar AS PRACTICAL  
14 ANY RESULTANT DAMAGE TO THE ECOLOGY, RESOURCES AND/OR THE  
15 ENVIRONMENT OF THE SHORELINE AREA?

16 RCW 90.58.020 provides, in part:

17 Permitted uses in the shorelines of the state shall  
18 be designed and conducted in a manner to minimize,  
19 insofar as practical, any resultant damage to the  
20 ecology and environment of the shoreline area and  
21 any interference with the public's use of the water.

22 We find that, as designed and constructed, the Swygard's development  
23 does not minimize, insofar as practical, damage to the shoreline  
24 ecology and environment. One of the most valued assets of shoreline  
25 environment is views afforded of the shoreline and adjacent body of

1 water. This is particularly important in this case since the  
2 shorelines of Lake Washington are Shorelines of Statewide  
3 significance. WAC 173-20-27; 173-28-020. With respect to the tennis  
4 court, its location in such close proximity to the ordinary high water  
5 mark, in combination with the height of the surrounding fencing and  
6 light standards, results in significant impairment of the view from  
7 adjacent property. This was observed by members of the board during  
8 an inspection of the site, and was evidenced through photo exhibits  
9 and testimony. (We note that substantial portions of the tennis court  
10 fencing along its north side were constructed at a reduced height of  
11 approximately 6 feet, preserving the view from the Swygard property).

12 In previous decisions we have determined that proximity of  
13 improvements to the shoreline can result in a violation of the  
14 policies of the SMA. For example, in Save v. Bothell, SHB Nos. 82-29,  
15 82-36, 82-43 and 82-53, the Board concluded (conclusion of law XVIII)  
16 that a 50-foot buffer of vegetation along a creek was not sufficient,  
17 and that in order to be consistent with the policy of the SMA  
18 expressed in RCW 90.58.020, a 100-foot buffer should be provided  
19 between the commercial development proposed in that case and the  
20 shoreline of a creek.

21 In this case, the Yarrow Point Zoning Ordinance establishes a  
22 50-foot setback from the ordinary high water point for all  
23 structures. (Fences of 6 feet in height or less are exempt from the  
24

25 SHB 87-22 & 87-23

26 FINAL FINDINGS OF FACT

27 CONCLUSION OF LAW & ORDER

(14)

1 setback requirement). Testimony elicited from the Swygards shows that  
2 it is feasible to relocate the tennis court and fencing upland to  
3 comply with the 50-foot setback requirement, and that this, in fact,  
4 was the intention of the Swygards before encountering a conflict with  
5 a sewer line. (Hearing transcript, day one, pages 124-127; day two,  
6 pages 49-51.) As evidenced by Exhibit AY2, the entity which currently  
7 owns and operates the sewer line is obligated to relocate the line  
8 without expense to the Swygards to avoid conflict with the Swygards'  
9 development.

10 Accordingly, the Substantial Development Permit should be modified  
11 to require that the tennis court and surrounding fencing and light  
12 standards be relocated upland so that no portion of it is within 50  
13 feet of the ordinary high water mark of the Lake.

14 The SDP should be further modified to include as an alternative to  
15 relocation of the tennis court, an alternate condition requiring  
16 reduction in height of the tennis court fencing to no greater than 6  
17 feet measured from the court surface, and removal of all light  
18 standards in excess of 6 feet in height. The Board finds that  
19 reduction of the height of the fencing would significantly reduce view  
20 blockage and achieve consistency with the SMA to an approximately  
21 equal extent as relocation of the court, and therefore the option of  
22 these two conditions should be left to the Swygards.

1 The Board finds that the construction and design of the south  
2 boundary fence results in a violation of the SMA and that the SDP  
3 should be modified to include a condition that the height of the south  
4 boundary fence be reduced to 6 feet measured from the ground  
5 immediately below the pre-existing, older fence located adjacent to  
6 the south boundary fence. The Board finds that this was the level of  
7 the ground immediately below the south boundary fence at the time of  
8 its construction and that measurement from that level would result in  
9 a fence which will minimize view blockage while providing privacy and  
10 separation of properties desired by the Swygards. The Board also  
11 finds that the terminus of the fence should be moved upland to the  
12 location of the Hitchings' stake denoting elevation 22. This location  
13 approximately corresponds with the ordinary high water mark on the  
14 property as evidenced by the line of vegetation and changing soil  
15 characteristics which is evident on the site and which is consistent  
16 with the definition of "ordinary high water mark" included in the  
17 SMA. RCW 90.58.030(2)(b).

18  
19  
20 VII

21 WHETHER THE PROPOSED PROJECT IS CONSISTENT WITH THE TOWN OF YARROW  
22 POINT SHORELINE MASTER PROGRAM?

23 The Yarrow Point Shoreline Master Program evidences an intent  
24 that the Town Zoning Ordinance be considered a part of the Master

25 SHB 87-22 & 87-23  
26 FINAL FINDINGS OF FACT  
27 CONCLUSION OF LAW & ORDER



1 Program with respect to development on property within the shoreline  
2 jurisdiction. For example, under the section headed "INTENT" the  
3 Master Program states:

4  
5 The ordinances of the Town and the policies in this  
6 local master program are consistent with the 1971  
7 Shoreline Management Act and the Lake Washington  
8 Regional Goals and Policies dated October 31, 1973.  
9 Any revisions herein recommended to the Town Zoning  
10 Ordinance or any other ordinance of the Town will be  
11 handled through the proper procedures for change,  
12 including notices and public hearings.

13 ...

14 The Town of Yarrow Point makes reference to the  
15 following Sections of Ordinance No. 165 (Zoning  
16 Ordinance) which pertain to the 200' of shorelands  
17 and wetlands: 5.3, 5.5, 5.6, 5.11, 5.23, 7.3.4,  
18 7.3.5, 7.3.7, 7.3.8, 7.4.5, 7.5, 7.5.1, 8.3, 8.3.1,  
19 8.4.1 and 8.4.4.3.4

20 The Town of Yarrow Point reserves the right to amend  
21 and/or repeal these sections of Ordinance No. 165 as  
22 necessary from time to time and to maintain full  
23 local control.

24 The Board concludes that this language effectively incorporated the  
25 Town Zoning Ordinance into the Master Program which was then approved  
26 by the Department of Ecology. Consequently, in determining  
27 consistency with the Yarrow Point Master Program, consistency with the  
28 Town Zoning Ordinance will also be considered.

29 Evidence submitted to the Board indicates that Yarrow Point  
30 Ordinance No. 165 was repealed subsequent to approval of the Master

1 Program and replaced with Ordinance No. 225. No amendment of the  
2 Master Program has been approved by the Department of Ecology.  
3 However, it appears that by approving the Master Program, including  
4 the language quoted above by which the Town "reserves the right to  
5 amend and/or repeal these sections of Ordinance No. 165...", the  
6 Department gave prospective approval to subsequent revisions to the  
7 Town's Zoning Ordinance. Under this theory, Ordinance No. 225 became  
8 a part of the Master Program upon its adoption by the Town without the  
9 necessity of amendment of the Master Program by the Department. On  
10 the other hand, if the repeal of Ordinance No. 165 and enactment of  
11 Ordinance No. 225 did not result in an automatic amendment of the  
12 Master Program, then the provisions of Ordinance No. 165 as it existed  
13 at the time of approval of the Shoreline Master Program continues to  
14 be a part of the Master Program. For the reasons stated below, the  
15 Board has concluded that the Swygards' development is inconsistent  
16 with the Yarrow Point Master Program regardless of whether Ordinance  
17 No. 165 or Ordinance No. 225 is considered to be the Zoning Ordinance  
18 incorporated as part of the Master Program.

19 Both Ordinance 165 and 225 contain identical prohibitions upon the  
20 location of structures within 50 feet of the ordinary high water mark,  
21 and both provide an exception for fences which do not exceed 6 feet in  
22 height. (See Sections 5.22 of Ordinance 165 and 5.23 of Ordinance No.  
23 225 (Definition of "Setback"), 7.2.2.2. of both Ordinances  
24  
25

1 (Restricting fences to 6 feet in height within the setback area) and  
2 8.4.1 of each ordinance establishing a minimum 50 foot setback from  
3 the line of ordinary high water copies of which are attached hereto).  
4 The Swygards' tennis court light standards violate both ordinances.  
5 The light standards constitute structures distinct from the tennis  
6 court fence. As such, they are not permitted within the 50 foot  
7 setback area absent a variance.

8 The tennis court fence itself violates the provisions of both  
9 ordinances because, although fences may be located within a setback  
10 area they may not exceed 6 feet in height under the terms of both  
11 ordinances. A variance is therefore required for the portion of the  
12 tennis court fence located within the 50 foot setback area.

13 The south boundary fence violates both ordinances 165 and 225.  
14 The fence is functioning as a retaining wall, and as such its height  
15 should be measured pursuant to the terms of Section 7.2.2.4 of each  
16 ordinance. So measured, the fence is approximately 7 feet in height  
17 throughout much of its length. In order to continue to maintain the  
18 fence at its present height a variance is required.

19 The Board finds that the land waterward of the stake placed by  
20 Hitchings representing elevation 22 constitutes "inundated land" as  
21 that term is used in Yarrow Point Ordinances 165 and 225. (Ordinance  
22 165, Section 5.11; Ordinance 225, Section 5.12.) Construction of a  
23 fence or other structure on inundated land is prohibited by the terms  
24  
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1 of each ordinance, except as expressly provided therein. (Ordinance  
2 165, Section 7.3.6; Ordinance 225, Section 7.3.4). The section  
3 governing inundated land in Ordinance 165 is specifically referenced  
4 in the Yarrow Point Master Program under the section headed "LANDFILL  
5 AND DREDGING", at page 11. Placement of the fence waterward of the  
6 line of ordinary high water mark as established by vegetation, and  
7 approximately marked by the Hitchings' stake, violates this  
8 provision. The Board finds that the deposit of materials at the  
9 shoreline on the Swygard property in the vicinity of the south  
10 boundary fence constitutes filling prohibited by both Ordinances 165  
11 and 225, and therefore is inconsistent with the Yarrow Point Shoreline  
12 Master Program, absent a variance.

13 Criteria for granting of a Shoreline Variance are set forth in WAC  
14 173-14-150. The Swygards contention that they had been denied due  
15 process of law through lack of notice of the criteria which the Town  
16 of Yarrow Point employed in considering Shoreline Variances is without  
17 merit. The applicable regulations clearly evidence that a Shoreline  
18 Master Program need not contain variance criteria in addition to those  
19 set forth in WAC 173-14:

20  
21 The criteria contained in WAC 173-14-140 and  
22 173-14-150 for shoreline conditional use and  
23 variance permits shall constitute the minimum  
24 criteria for review of these permits by local  
25 government and the department. More restrictive  
26 criteria may be applied where it exists in approved  
27 and adopted local master programs. (Emphasis added).

1 Additionally, the Swygards were given notice that criteria in WAC  
2 173-14 would govern a decision on their variances. AS-6; AS-17:  
3 transcript, (day one) pages 63-64. The re-hearing of the variance  
4 matter conducted by Yarrow Point also would have cured any lack of  
5 notice of the appropriate criteria during the first proceeding.  
6 Finally, the de novo proceeding before this Board provided a third  
7 opportunity for the Swygards to establish the need for a variance.

8 VIII

9 The Swygards have failed to meet their burden of showing that the  
10 criteria governing issuance of a variance have been met, and therefore  
11 the variances should be denied.

12 IX

13 The Board concludes that the Swygards' development is inconsistent  
14 with the Yarrow Point Shoreline Master Program and that it should be  
15 conditioned as set forth above.

16 X

17 Any finding of fact which has been erroneously deemed a conclusion  
18 of law is hereby adopted as a finding of fact. From these conclusions  
19 of law, the Board now enters the following  
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ORDER

The Order of the Town of Yarrow Point granting a substantial development permit for the improvements on the Swygard property identified above is hereby modified to add the following additional conditions:

1. The tennis court, tennis court fencing and light standards shall be modified by either:

a. relocating these improvements upland so that no portion of them is located within 50 feet of the ordinary high water mark of Lake Washington, or

b. reducing the height of the tennis court fence to no more than 6 feet measured from the surface of the tennis court and removing the light standards, or

c. removing all screening and light standards.

For the purposes of determining the ordinary high water mark on the Swygard property, the Department of Ecology is directed to have appropriate representatives inspect the site and mark upon the property the location of the ordinary high water mark which existed at the time the tennis court grading and other tennis court development was undertaken. The determination of the Department of Ecology shall be final and binding upon the parties in this matter.

2. The south boundary fence shall be reduced in height to no greater than 6 feet when measured from the ground immediately below the adjacent, pre-existing fence, and the terminus of the fence near


1 the shoreline shall not extend waterward of the stake placed by  
2 Hitchings to denote elevation 22.

3 3. Denial of the shoreline variances by the Town of Yarrow  
4 Point is hereby affirmed.

5 DONE at Lacey, Washington, this 10<sup>th</sup> day of May 1988.

6  
7 SHORELINES HEARINGS BOARD

8  5/10/88  
9 LAWRENCE J. FAULK, Presiding

10   
11 ANNETTE MCGEE, Member

12   
13 ROBERT A. ROSE, Member

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15 WILLIAM CAMERON, Member  
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